Supreme Court of the United States

OCTOBER TERM 1951

No. 719

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, a voluntary association, and ALBERT J. FITZGERALD, JULIUS EMSPAK and JAMES J. MATLES, as members thereof and as representatives of all of the members and locals thereof, *Petitioners,*

against

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania Corporation,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (CIO), a voluntary association; and JAMES E. CAREY and MICHAEL FITZPATRICK, as members thereof and as representatives of all of the members and locals thereof, Local 410, Bloomfield, N. J., and Belleville, N. J., and ARTHUR MCBRIDE and PHILIP COSIMANO, members thereof and as representatives of all of the members thereof, Local 426, Newark, N. J., and MAURICE VENERIE, as a member thereof and as a representative of all the members thereof, et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The United Electrical, Radio and Machine Workers of America, and Albert J. Fitzgerald, Julius Emspak and James J. Matles, as members thereof and as representa-

tives of all of the members and locals thereof, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit (R.220), affirming the judgment of the District Court for the Western District of Pennsylvania dismissing the complaint herein.

Opinions Below

The opinion of the Court of Appeals (R.216) is not yet reported. The opinion of the district court granting plaintiff's motion to dismiss the complaint (R. 146) is reported at 99 F. Supp. 967.

Jurisdiction

The judgment of the Court of Appeals was rendered on February 21, 1952. The jurisdiction of this Court is invoked under Title 28, Section 1254, of the Judicial Code.

Preliminary Statement

A—The Proceedings Below

Plaintiff-Respondent, the Westinghouse Electric Corporation, instituted this interpleader action on May 26, 1950, under Section 1335 of the Judicial Code (R. 2), depositing $270,403.25 in the registry of the District Court for the Western District of Pennsylvania (R. 21). This sum consisted of union dues deducted from the wages of employees pursuant to a collective bagaining contract (R. 17).

Defendant-Petitioner, the United Electrical, Radio and Machine Workers of America, hereinafter referred to as UE, a national trade union and its subordinate locals, and Defendant-Respondent, the International Union of Electrical, Radio and Machine Workers of America, CIO, here-

inafter referred to as IUE, a rival union, and its subordinate locals, were joined in the action as claimants to the fund (R. 2).

IUE moved to dismiss the interpleader complaint on the grounds *inter alia* of *forum non conveniens* (R. 58). Westinghouse vigorously opposed this motion (R. 61), and the motion to dismiss was denied by the lower court (R. 72). Almost a year later, after answers and counterclaims were filed by the defendants, plaintiff Westinghouse moved for a dismissal of its own action on the same grounds of *forum non conveniens* (R. 135). The district court granted this motion (R. 151) and defendant-petitioner UE and its subordinate locals appealed from this order to the Court of Appeals for the Third Circuit. The Court of Appeals affirmed the judgment of the district court (R. 220), but stayed its mandate pending the disposition of this petition for writ of certiorari.

B—Statement of Facts

Plaintiff-Respondent Westinghouse Electric Corporation, is a corporation organized under the laws of the State of Pennsylvania with its principal place of business in Pittsburgh, Pennsylvania (R. 2). Westinghouse Electric Corporation is engaged in the manufacture, sale and repairing of electrical machinery, equipment and devices, with plants in Pittsburgh, East Pittsburgh, Philadelphia and Sharon, Pennsylvania; Springfield, Massachusetts; Buffalo, New York; Bloomfield, Belleville, Newark and Jersey City, New Jersey; Cleveland, Lima and Mansfield, Ohio; St. Louis, Missouri; and Fairmont, West Virginia (R. 3).

The Defendant-Petitioner, United Electrical, Radio and Machine Workers of America, is a labor organization of hundreds of thousands of men and women employed in the electrical, radio and machine industries, members of which are residents of states throughout the country (R. 109). UE was certified and recognized as the bargaining agent

of the employees of plants of the Westinghouse Electric Corporation for the period involved in the present proceedings (R. 108) and has consummated collective bargaining agreements with Westinghouse Electric Corporation covering the employees at the Westinghouse plants throughout the country (R. 110).

The Defendant-Respondent, International Union of Electrical, Radio and Machine Workers, CIO, was organized in November 1949, as a rival labor organization in the electrical, radio and machine industries (R. 6).

On April 1, 1947, a collective bargaining contract was entered into between the Westinghouse Electric Corporation acting on behalf of itself and the UE acting on behalf of and in conjunction with its various Westinghouse locals (R. 110). This contract was modified on April 1, 1948, and its duration extended until March 31, 1950 (R. 111). The contract and its supplements were signed in Pittsburgh, Pennsylvania (R. 110). The UE, until the expiration of the contract, was the certified and recognized bargaining agent of all of the Westinghouse employees, except for certain crafts in a few plants (R. 110, 111). Since that time UE has been certified as collective bargaining agent for approximately fifty percent of the Westinghouse Electric Corporation employees.

On April 1, 1948, the parties to the contract agreed upon a dues deduction authorization as contained within the national agreement between the UE and Westinghouse Electric Corporation, under the terms of which Westinghouse was to deduct and transmit to the UE each month the union dues of those employees who had signed a dues deduction authorization (R. 111, 112, 113). Subsequent to April 1, 1948, a vast majority of employees executed the dues check-off forms. The vast majority of authorizations remained in full force and effect at all times between July 1, 1948, and March 31, 1950 (R. 113). The dues so deducted and transmitted to the UE were used, under the terms of the constitution of the UE, for the administration of the national union and its subsidiary locals (R. 113).

Between November 1, 1949, and March 31, 1950, during which time the national agreement between the UE and Westinghouse was in full force and effect, the Westinghouse Electric Corporation withheld from the wages of the employees the sums which were authorized under the dues deduction authorizations, but failed and refused to transmit to the UE through its authorized locals the monies so withheld (R. 114, 115). The UE and its locals have at all times asserted and continue to assert a claim to all of the monies which have been improperly withheld by Westinghouse (R. 115).

Westinghouse, on May 26, 1950, instituted this interpleader action under the terms of Section 1335 of the United States Judicial Code, and in accord with an order of the court, deposited the monies withheld in the amount of $270,403.25 in the registry of the Federal District Court for the Western District of Pennsylvania, wherein said action was instituted. Westinghouse in its action asked that the court determine who was entitled to the funds in view of the conflicting claims of the UE and the IUE. UE and IUE and their subsidiary locals covering Westinghouse employees were made parties defendant.

Westinghouse claimed it was in doubt as to who was entitled to the possession of these monies because of the existence of these two rival labor organizations in the electrical industry. In April of 1950 the IUE had instituted five individual suits against Westinghouse in five states, seeking to obtain part of the monies on the theory that the IUE locals stood as successor in interest to the UE locals (R. 17, 18, 19, 20). Two of these actions were instituted in state courts and three of the actions were instituted in federal district courts.

Westinghouse removed the two state actions to the federal courts (R. 18, 20). UE was not and since that time has not become a party in any of the five actions.

In the complaint Westinghouse alleged that it had been advised that the locals of the IUE were to institute addi-

tional individual actions for the monies withheld which would in all probability result in thirteen separate law suits on the part of the IUE locals (R. 20). Westinghouse further alleged that the UE asserts its claim to the entire sum of money on behalf of itself and its locals and that

> "unless the conflicting rights and demands of the several defendants in and to the sum of money aforesaid can be determined and adjudicated in some single proceeding before this court or some other competent court, the plaintiff will be subjected to the necessity of defending a multiplicity of suits and to grave risks that it may be required by the adjudication of different courts to sustain and discharge double or multiple liabilities, that it will be subjected to great and unnecessary cost and expense and that it may suffer other irreparable injuries" (R. 21).

Westinghouse requested an injunction against the defendant unions restraining them from instituting any action or prosecuting any action already instituted for the monies withheld. The district court in its order of May 26, 1950, granted this relief and accordingly enjoined the defendants from instituting or continuing any actions for the monies constituting the dues deductions from the Westinghouse employees (R. 48-50).

The IUE on July 5, 1950, moved to dismiss the interpleader action on the ground *inter alia* of *forum non conveniens*.

Westinghouse opposed in all respects the motion of the IUE, as did the UE (R. 61-69).

The plaintiff-respondent in its brief and arguments in opposition to the IUE motion to dismiss, transfer or sever on the grounds of *forum non conveniens* maintained that there was no basis in law and fact for the plea of inconvenient forum. Westinghouse, in response to the IUE contention that it would be required to bring witnesses from seventeen different plants, declared in its brief:

> "* * * it may be well even at this stage of the matter to point out that the facts asserted by Mr. Sigal

(attorney for IUE) are apparently not sufficient to justify either a dismissal of the action or its severance into parts and the transfer of various such parts to other districts.

"A dismissal would be improper and unwarranted for at least two reasons: first because if the jurisdictional facts exist as they do here the plaintiff has a legal right to a decree of interpleader in some district court—either this or some other (see *Railway Express Co.* v. *Jones, et al.*, 106 F. 2d 341, 7 C. C. A. 1939); and secondly, because under the practice established by the present Judicial Code (28 U. S. C. 1404) an action brought in the wrong district cannot be dismissed but can only be transferred to a proper district * * *.

"The plaintiff has nothing to gain in this case except freedom from the expense, vexation and risk of taking part in a number of cases at scattered places. In contrast the defendants have large material gains in prospect. If their claims are valid the defendant IUE locals may hope to recover the entire $270,403.25, a sum which certainly justifies a substantial expenditure of money and energy.

"Secondly, the doctrine of forum non conveniens can properly be applied to the transfer of an action only where it appears that the plaintiff has chosen to bring his suit in a district which must have been chosen simply to harass or oppress the defendant * * *.

"In the present case the plaintiff has chosen the judicial district where the checkoff contract was made; where a majority of the employees concerned reside; where the major portion of the fund in controversy was earned; and where its own offices and principal records are located. The location is as central to all of the other parties as any other could be * * *. *In short, plaintiff here has chosen that venue which is not only most economical and advantageous to itself, but also more economical and more advantageous to the interests of the several defendants than any other single district could be.*" (Emphasis added.)

This was the formal position of the Westinghouse Electric Corporation in response to the IUE motion to dismiss on the grounds of *forum non conveniens.*

Westinghouse stated further in response to the contention of the IUE as to *forum non conveniens* (R. 63):

> "If the facts concerned in this matter are to be considered in the determination of this case and if it appears that the presentation thereof is made difficult by the circumstances that the witnesses are residents of numerous widely scattered places, the plaintiff stands ready to develop the facts, or such as continue to be the subject of controversy, either by way of interrogatories or by taking depositions of the qualified witnesses at such place or places as shall prove to be convenient to all of the parties to this case."

As further ground for opposing the IUE motion to dismiss, Westinghouse stated in an affidavit by Clark C. Frame that the fund in issue was a single fund, title to which is litigable in one forum (R. 62):

> "I deny the averment of Mr. Sigal in the affidavit that said sum of $270,403.25 is not in fact a single fund. It was accumulated as a whole pursuant to the provisions of a single contract, to wit, the plaintiff's agreement of April 1, 1947 with the UE, Exhibit A attached to the complaint. It has been claimed as a single fund by the UE as distinguished from the UE locals. Attached hereto marked Exhibit B * * * is a true copy of a letter addressed to the plaintiff by the General Counsel of the UE on May 17, 1950 which states that 'the UE international, of course, has a claim in respect to such funds based on per capita payments, etc. * * *' * * * Every instance on which there has been any occasion to state its position, the UE has made known to the plaintiff that it has claims to the entire fund which has been paid into court which are independent of the possible claims of its subsidiary locals."

On August 11, 1950, the district court by Marsh, *J.*, issued an opinion and order denying the IUE's motion to dismiss on the ground *inter alia* of *forum non conveniens,* and holding that the court had jurisdiction over the complaint. The court further directed the defendants to answer the complaint within 30 days thereafter, subsequent to which a hearing on the interpleader would be held (R. 48-50).

On September 28, 1950, defendants IUE filed an answer to the complaint of Westinghouse wherein they asserted a claim to funds deposited in the federal registry (R. 89-104).

IUE in its answer counterclaimed against Westinghouse in the amount of $62,274 (R. 78-107).

On October 2, 1950, UE filed an answer asserting its claim to the entire fund of $270,403.25 and asserted an affirmative counterclaim in the amount of $62,274 (R. 108-129).

The counterclaims of $62,274 asserted by both UE and IUE arose out of the background of confusion created by the claims of the IUE. Upon its organization in November, 1949, the IUE made claim to be the collective bargaining agent. So as to prevent unnecessary delays in production and to stabilize labor relations at the Westinghouse plants, an agreement was consummated between Westinghouse, UE and IUE that payments for duly authorized lost time would be made to those workers who were union representatives as of November 1, 1949. Under the terms of the national agreement the union and the company share the cost of lost time for union activities incurred in the Westinghouse plants.

Westinghouse stated formally that it was prepared to pay the additional sum involved in the counterclaim into the registry of the court, should it be determined after hearing that the company's right to deduct this sum was open to question.

Westinghouse in its reply brief to the IUE motion to dismiss stated:

> "It is possible that the defendants' objection is based upon the plaintiff's failure to pay into court the sum of $62,274 withheld in the manner described above as the union's one-half share of the monies paid union representatives for working hours expended in union activities. The plaintiff's right to credit that sum had not been questioned by anybody until the motion to dismiss was filed. It is questioned in general terms by the affidavit of Benjamin C. Sigal tendered in support of the motion to dismiss. *If Mr. Sigal's question*

is pressed by his client and if it be held after hearing that the plaintiff's right to this credit is open to question, the plaintiff will seek leave to amend its complaint to add the $62,274 to the fund involved in the case and will at the same time either pay the additional sum into court or file such bond as the law may require" (emphasis added).

Thus, Westinghouse in its argument and brief made clear that it would, even at the expense of adding $62,274 to the federal registry, maintain its status as a stakeholder in this action.

On April 21, 1951, eleven months after the institution of the interpleader action, eight months after the decision of the court on IUE's motion to dismiss, and six months after the filing of answers and counterclaims, the Westinghouse Electric Corporation, although it instituted this action on its own accord in a forum of its own choosing, the district of its principal office and place of business, and in the state of its incorporation, and in the federal district wherein more than fifty per cent of the funds in controversy were located, filed a motion to discontinue and dismiss its interpleader action on the grounds of *forum non conveniens.*

This untimely plea of an inconvenient forum by the plaintiff-respondent Westinghouse was vigorously opposed by the UE (R. 66-69, 140-145). It was supported by the IUE.

In the affidavit of William E. Miller setting forth the facts warranting dismissal on the grounds of *forum non conveniens,* Westinghouse failed to state or claim any change in facts or circumstances warranting its reversal of position. Westinghouse alleged in this affidavit that because of the counterclaim, it would be necessary for Westinghouse to bring as witnesses accountants and others from its various plants to the district court in Western Pennsylvania.

The Court of Appeals for the Third Circuit affirmed the judgment of the district court granting Westinghouse's

motion for an order of dismissal, but stayed the mandate of the court pending a determination by this Court of this petition for writ of certiorari.

Statutes Involved

28 U. S. C. 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, c. 646, 62 Stat. 931.

Rule 13 of the Federal Rules of Civil Procedure. Counterclaim and Cross-Claim.

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

Rule 41 of Federal Rules of Civil Procedure. Dismissal of Actions.

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; By Stipulation. Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plain-

tiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

28 U. S. C. 1404. Change of venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending. June 25, 1948, c. 646, 62 Stat. 937.

Questions Involved

1. Whether a claim against a plaintiff in a federal interpleader action which arises out of the transaction or occurrence which was the subject matter of the original action is a counterclaim within the meaning of Rule 13 of the Federal Rules of Civil Procedure?

2. Whether a counterclaim for additional relief asserted by a defendant in a federal interpleader action against the stakeholder-plaintiff is a counterclaim within the meaning of Rule 41(a)(2) of the Federal Rules of Civil Procedure so as to preclude voluntary dismissal of the action?

3. Whether Section 1404 of the Federal Judicial Code precludes a dismissal of an action by a plaintiff when the dismissal is sought solely on grounds of inconvenient forum?

Summary Statement of the Matter Involved

The questions here presented involve important problems in the administration of the federal interpleader statute. The threshold problem in this petition centers around an analysis of the initial stages of a federal interpleader proceeding.

In its initial complaint for interpleader, plaintiff-respondent, Westinghouse, deposited $270,403.25 in the registry of the district court asserting that this was the amount of money owed to either defendant UE and/or its locals, or defendant IUE and/or its locals (R. 2). Following a direction of the district court, the defendants to the interpleader action answered the complaint, setting forth their claims to the money involved. In addition, defendant UE filed a counterclaim against plaintiff Westinghouse in the amount of $62,274. IUE likewise filed a similar counterclaim. Defendants UE and IUE asserted in these counterclaims that an additional amount of money was due and owing under the national agreement authorizing the deduction of union dues from plaintiff's employees.

Thus, at the time of serving the answer, the UE and the IUE asserted claims for $62,274 arising out of the transaction or occurrence which was the subject matter of plaintiff Westinghouse's claim for interpleader relief.

Plaintiff-respondent Westinghouse, after almost a year's delay, sought a voluntary dismissal under Rule 41(a)(2).

The petitioner UE objected to dismissal *inter alia* on the ground that the pending counterclaims barred dismissal under Rule 41(a)(2). Rule 41(a)(2) states:

> "If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion

> to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court."

The Court of Appeals held as a matter of first impression that Rule 41(a)(2) did not apply since affirmative claims for additional relief asserted against a plaintiff in an interpleader action are not true counterclaims.

This petition thus raises before this Court the question as to whether a claim against the plaintiff in a federal interpleader action arising out of the transaction which was the subject matter of the original interpleader action is a true counterclaim within the meaning of Rule 13 and Rule 41(a)(2) of the Federal Rules of Civil Procedure.

The petition also raises an additional question not yet decided by this Court. The plaintiff having chosen his own forum and having resisted a prior motion to dismiss for inconvenient forum reasons, almost a year after the inception of the action, sought to dismiss his own action solely upon the grounds of a plea of *forum non conveniens*. The petition thus raises the question as to whether the policies embodied in Section 1404 of the Federal Judicial Code preclude a dismissal of an action by a plaintiff when dismissal is sought solely on grounds of inconvenient forum.

Reasons for Granting the Writ

I.

There are presented here for decision several important questions which have not been, but should be, settled by this Court. These issues involve important questions of federal law which have not been, but should be settled by this Court. These questions involving the administration of federal law have been decided in a way probably in conflict with the applicable decisions of this Court and in conflict with the decisions of other Courts of Appeal.

II.

In affirming the district court's order of dismissal, the Court of Appeals found it necessary to carve a wholly unprecedented exception into the hitherto clear meaning of Rules 13 and 41(a)(2) of the Federal Rules of Civil Procedure. The Court of Appeals found it possible to avoid the direct mandate of the Federal Rules only by holding as a matter of first impression that affirmative claims for relief directed against a plaintiff in a federal interpleader action are not "counterclaims" within the meaning of Rules 13 or 41(a)(2).

We suggest that this novel exception to the Federal Rules enunciated by the Court of Appeals is wholly unsupported by authority and contrary to the letter and spirit of the Federal Rules of Civil Procedure here involved.

Rule 13 of the Federal Rules of Civil Procedure defines a compulsory counterclaim as:

> "Any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim * * *."

Until the decision of the Court of Appeals in this matter, there has never been the slightest suggestion that Rule 13 was qualified by an unwritten proviso excepting from its general reach and scope federal interpleader actions. Until this opinion, Rule 13 has always been applied on its face without reservation to the determination of whether a counterclaim has been made in a federal interpleader action. The Court of Appeals for the Eighth Circuit, recently in *Coastal Air Lines, Inc.* v. *Dockery,* 180 F. 2d 874, (CA 8), in testing the presence of counterclaims in interpleader actions, inquired "whether the claims arose 'out of the transaction or occurrence' which was 'the subject matter of the original action'." The Court of Appeals for the Third Circuit in affirming the order of dismissal in this action, has rejected this test and has written a new and, we

suggest, unwarranted exception to the sweep of Rule 13. The normal test envisioned by Rule 13 would require a finding that the additional affirmative claims for relief of $62,274.00, asserted by UE and IUE against the plaintiff, constituted proper counterclaims. Until the opinion of the Court of Appeals, the only criteria ever suggested in applying Rule 13 or Rule 41(a)(2) was an examination into whether the claim arose out of the transaction or occurrence which was the subject matter of the original action. In the instant case, neither the respondents nor the court below argued that these additional affirmative claims for relief did not arise out of the transaction which was the subject of the interpleader action. The only rationale offered for this novel approach to Rule 13 and Rule 41(a)(2) is the suggestion that the counterclaims here are not true counterclaims within the meaning of Rule 13 because their very assertion may conceivably destroy the interpleader action itself, should the plaintiff refuse at a later date to increase the deposit in the court.*

Until this opinion, there has been no suggestion in the decisions of this Court or of any of the federal courts that the plain words of Rule 13 and Rule 41(a)(2) did not apply

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* We suggest that this fear as to the jurisdictional effects of the asserted counterclaims is unfounded in light of the present record. The Court of Appeals indicates that the assertion of the counterclaims might at some later stage destroy the jurisdiction of the court to proceed with the entire interpleader action. The court argues that should Westinghouse refuse to secure or pay the disputed additional funds into court, the action might have to be dismissed because of the lack of an essential jurisdictional element. The court relies on *Ednor* v. *Massachusetts Mutual Life Insurance Co.*, 138 Fed. 2d 327 (C. A. 3).

However, as the district court itself pointed out in its original opinion denying IUE's motion to dismiss, should it ultimately be determined on a hearing that the counterclaim for $62,274 is justified, the plaintiff will "then be able to amend and pay the additional amount into court or post a bond to secure same." As a matter of fact, plaintiff Westinghouse formally stated to the district court that should the counterclaim be sustained, it was prepared to "either pay the additional sum into court or file such bond as the law may require."

to federal interpleader actions. One of the few federal decisions dealing directly with this question is the leading opinion of Judge Learned Hand, sitting as District Court Judge in *Sherman National Bank of New York* v. *Schubert Theatrical Co.*, 238 Fed. 225 (S. D. N. Y. 1916), affirmed 247 Fed. 256. The *Sherman National Bank* case involved a petition for a bill of interpleader. Judge Hand held *inter alia* that even where a plaintiff has an interest in a fund or where the amount of the fund is contested, counterclaims may be presented by the interpleaded defendants against the plaintiff-stakeholder. Judge Hand's opinion concluded with a direction that

> "The parties must prepare and serve their counterclaims against each other * * * if any of the Schubert Theatrical companies (defendants) has any claim against the *plaintiff* * * * it may do the same."

Judge Hand's opinion in the *Sherman National Bank* case has been cited approvingly by this Court in one of its leading discussions of interpleader practice, *Texas* v. *Florida*, 306 U. S. 398.

The broad principle underlying Rule 13 does not justify the exception carved into it by the opinion of the Court of Appeals. The definition of counterclaim contained in Rule 13 is sweeping in its scope and does not support any inference of limitation. As Professor Moore states in his treatise on federal practice:

> "*Any claim* which a defendant has against a plaintiff is a counterclaim." (3 Moore's Federal Practice, 2nd Ed., p. 8). (Emphasis added.)

Again Professor Moore states:

> "Under this Rule, a counterclaim is any claim including set-off and recoupment which one party has against an opposing party" (supra, p. 8).

Rule 13, while modelled on former Equity Federal Rule 30 (see original Committee Note of 1937 to Rule 13), was

broadened and liberalized in many respects. There is no warrant in the history of Rule 13 or in its application and interpretation by the courts to exclude from its scope federal interpleader actions. Since the affirmative claims for relief against the plaintiff filed by the defendants IUE and UE, arose out of the transaction or occurrence which was the subject matter of the original interpleader action, they constitute counterclaims within the meaning of Rule 13 of the Federal Rules of Civil Procedure.

Since these affirmative claims for relief are properly counterclaims, the Court of Appeals erred in failing to enforce the mandate of Rule 41(a)(2).* The salutory purpose of Rule 41(a)(2) is to prevent a plaintiff from destroying the right of the defendant to litigate a claim against that plaintiff once the claim has been asserted. 5 Moore's Federal Practice, 1032. The Rule that an action will not be dismissed in the presence of a pending counterclaim, reflects the principle that voluntary dismissal should never be granted in the face of legal injury to a defendant. *Pullman Car Co.* v. *Central Transportation Co.*, 171 U. S. 138; *Leach* v. *Ross Heaters Mfg. Co.*, 104 F. 2d 88 (CA 2); *Deauville Corp.* v. *Garden Suburbs Golf & Country Club,*

* The plaintiff could not dismiss the interpleader action as a matter of right. Rule 41 of the Federal Rules of Civil Procedure sets forth the conditions under which a party seeking affirmative relief may discontinue and dismiss its action. Rule 41(a)(1) permits dismissal of an action by a plaintiff by the filing of a notice of dismissal "at any time before service by the adverse party of an answer * * *." Rule 41(a)(2) provides that subsequent to the filing of an answer the action may be dismissed only upon the order of the court.

The district court in denying the IUE's motion to dismiss on August 11, 1950, ordered the defendants UE and IUE to file answers to the complaint of the plaintiff Westinghouse. Such answers were filed by both UE and IUE. Each of the answers filed asserted counterclaims for affirmative relief. (R. 78-107, 108-129). Plaintiff moved the court for dismissal of its action after the parties in the proceeding had served and filed their respective answers and counterclaims.

Under Rule 41, therefore, plaintiff's motion to dismiss could not have been granted as a matter of right.

165 F. 2d 432 (CA 5); *Butler* v. *Denton*, 150 F. 2d 687 (CA 10).

Rule 41(a)(2) thus stands for the proposition that a plaintiff may not voluntarily withdraw an action once an opposing party has asserted an affirmative claim for relief. It is no answer to the principle underlying Rule 41(a)(2) to argue that relief may not ultimately be available for the counterclaim. In the first place, as we have indicated, there is no indication in this record that the jurisdiction of the court over the interpleader action would have been destroyed by the counterclaims. Secondly, it is clear that even if the plaintiff had withdrawn its offer to pay in the additional sums of money or file the appropriate bond, independent jurisdiction over the counterclaim would have been vested in the court by Section 301 of the Labor Management Relations Act. The action would then become a bill in the nature of interpleader with an independent basis for federal jurisdiction under Section 301 of the Labor Management Relations Act, which provides:

> "Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The Court of Appeals would seem to infer that Rule 41(a)(2) is applicable to interpleader actions only if the affirmative claim for additional relief against the plaintiff could not possibly destroy the jurisdiction of the court over the entire action. As we have suggested above, this engrafting of an exception into Rule 41(a)(2) is unsound in principle and unwarranted in authority. Nevertheless, even if this interpretation of the Federal Rule were to be followed, its application by the Court of Appeals was erroneous. The record indicates that the plaintiff West-

inghouse never retracted its offer to pay an additional sum into the registry of the court representing the amount claimed in the affirmative counterclaims. But even if this offer had been rejected, as we have indicated, the district court would have retained jurisdiction over the action as a bill in the nature of interpleader grounded upon Section 301 of the Labor Management Relations Act.

The opinion of the Court of Appeals thus seriously undermines the liberal scope of the Federal Rules of Civil Procedure as applied to federal interpleader actions and should be reviewed by this Court.

III.

The plaintiff's motion to dismiss filed almost a year after the defendant IUE's motion to dismiss was denied by the district court, is grounded exclusively on a plea of *forum non conveniens*. The principles embodied in Section 1404 of the Federal Judiciary Code preclude the voluntary dismissal of an action by a plaintiff under Rule 41(a)(2) on a plea of *forum non conveniens*.

The district court in its opinion of July 11, 1951, granting the plaintiff's motion to dismiss, did so essentially on the ground that to proceed with the action would cause additional expense and inconvenience to Westinghouse. The rationale used by the court in granting the plaintiff's motion to dismiss was not based on lack of jurisdiction or improper venue.

The original decision of the district court had already held that the court had jurisdiction of the action and that venue was properly laid (R. 48-50). The facts upon which the court rendered the decision were based solely on the affidavit of Mr. Miller in support of plaintiff's motion to dismiss. In that affidavit the grounds for dismissal as set forth by Westinghouse were as follows (R. 138-139):

> "(a) That the issues raised by the defendants' answers will require the presence at the final hearing of

witnesses and records brought from the several plant locations aforesaid; and

"(b) That, whatever its outcome, further litigation of the question of jurisdiction aforesaid in this Court or the Appellate Courts, or both, will involve amounts of expense, delay and uncertainty which will offset the advantages of further proceedings here, to any of the parties."

The grounds as presented by the plaintiff and as ruled on by the court below were thus solely based upon a plea of *forum non conveniens.*

Under the Federal Rules of Civil Procedure, an action may not be discontinued or dismissed on the grounds of *forum non conveniens.* Since the enactment of Section 1404 of the Federal Judicial Code, a party is precluded in the federal courts from obtaining a dismissal of an action on the plea of inconvenient forum. Section 1404 provides:

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

"(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

"(c) A district court may order any civil action to be tried at any place within the division in which it is pending. June 25, 1948, c. 646, 62 Stat. 937."

Section 1404 was drafted by Professor James N. Moore. In his Commentary on the U. S. Judicial Code 1949, Prof. Moore states:

"Unlike the former statutes, the Code deals in Section 1404 with forum non conveniens along modern and

sensible lines for judicial administration. *Whereas the principles of forum non conveniens resulted in the dismissal of an action, the doctrine now results in a transfer. The principles of Section 1404 apply to all civil actions, whether the venue is governed by Title 28 or is governed by some other Title of the United States Code."* * (Emphasis added.)

In his commentaries, Prof. Moore further states:

"Sub-section B provides for transfer of any action, suit or proceeding of a civil nature from one division to another division of the same district. This language is sufficiently broad to include an admiralty and any other proceeding of a non-criminal nature. * * * The only qualification of Section 1404 B is that the proceedings be of a civil nature. * * * This is a clear recognition that the doctrine of forum non conveniens is a facet of venue; and that it involves elements of convenience to all concerned. This is a procedural matter and hence State law is not controlling under Erie v. Tompkins. * * * *But 1404A does not authorize a dismissal for forum non conveniens; instead when this doctrine is invoked, the action is to be transferred to a proper and more convenient venue. Subsection A of 1404 goes beyond prior practice in that its principles apply to any civil action and it alters the prior practice of dismissal of an action because of forum non conveniens.*" (Emphasis added.)

The opinion of the Court of Appeals in this proceeding raises squarely for the first time before this Court the important issue in the administration of Federal Civil Procedure as to whether a plaintiff may avoid the principles laid down in Section 1404 by labelling a plea of *forum non*

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* That Prof. Moore's commentary on the impact of 1404 in federal civil procedure is of great, if not decisive weight is attested to by the language of this court in *U. S. v. National City Lines*, 337 U. S. 81:

"The reviser's notes are so obviously authoritative in perceiving the meaning of the Code that the government itself in discussing a section other than Section 1404A refers to them in its brief in the case."

conveniens as a motion for voluntary dismissal under Rule 41(a)(2).*

The policy reasons which militate against the *dismissal* of an action for reasons of an inconvenient forum in respect to a defendant, are equally persuasive in respect to a plaintiff. This is particularly evidenced by the record in this proceeding. Having strenuously resisted IUE's motion to dismiss or transfer on grounds of *forum non conveniens,* almost a year later plaintiff moves to dismiss on the same grounds. Having obtained injunctive relief against the defendants for over a year, restraining the institution of any independent claims for relief, the plaintiff should not now be permitted to evade the policy of Section 1404 by characterizing an inconvenient forum plea as a motion for voluntary dismissal under Rule 41(a)(2).

The sound policy considerations underlying the rule that actions will not now be dismissed in the federal courts on a plea of *forum non conveniens,* requires the review of the decision of the Court of Appeals.

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* Westinghouse's motion to dismiss its own action demonstrates the unusual spectacle of a plaintiff complaining that its own choice of forum is inconvenient. The rules of orderly procedure require that a plaintiff may not invoke the doctrine of *forum non conveniens* so as to obtain either dismissal or transfer of an action. This elementary concept has been restated recently in a federal court in a decision directly holding that a plea of inconvenient forum as embodied in Section 1404A is not available to a plaintiff.

In *Barnhart* v. *Rogers,* 85 F. Supp. 545 (N. D. Ohio W. D. 1949) the district court after making note of the fact that the party who chose the forum could not obtain relief under this doctrine prior to 1404, went on to state:

> "It appears to the Court that the motivating reason for the enactment of Section 1404A was to afford relief to a defendant by placing him on a footing of equality with a plaintiff in the selection of a forum for the trial of the case. If this be true, then it would be improper to hold in effect that the plaintiff's rights are enlarged thereby and that he may carry the defendant about the country to a forum that best suits his convenience and do so by virtue of the statute.
>
> "It appears to this Court that Section 1404A is not available to plaintiffs who voluntarily chose their own forum" (p. 599).

CONCLUSION

The petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment.

Respectfully submitted,

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